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No. 98-64

In The

Supreme Court of the United States

October Term, 1997

REBECCA A. JONES, EXECUTRIX OF THE ESTATE OF SCOTT R. JONES, DECEASED,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari In The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Plaintiff/petitioner is Rebecca A. Jones, Executrix of the Estate of Scott R. Jones, Deceased.

Defendant/respondent, Consolidated Rail Corporation, is a wholly-owned subsidiary of Conrail, Inc., which is not a publicly held corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Albany Port Railroad Company; Belt Railroad Company of Chicago; Indiana Harbor Belt Railroad Company; Lakefront Dock and Railroad Terminal Company; Peoria & Pekin Union Railway Company; and TTX Corporation.

Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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STATEMENT OF THE CASE

This petition seeks review of a decision of the Sixth Circuit affirming judgment that was entered on a jury verdict in favor of respondent Consolidated Rail Corporation ("Conrail").

The case arose out of a car-train accident that occurred at a crossing equipped with flashing lights and automatic gates. Most of the facts were undisputed: petitioner's decedent, Scott Jones, drove around the downed gates and into the path of Conrail's train, which was traveling within the allowable track speed, with its horn blowing and state-of-the-art alerting lights flashing on the front of the locomotive. Jones had an open view in the direction of the approaching train, but drove around at least one car that was stopped in his lane of travel at the crossing, and onto the tracks immediately in front of the train.

Petitioner sued Conrail in federal court on the basis of diversity of citizenship under 28 U.S.C. 1332. The complaint alleged negligence by Conrail in the design and operation of the grade crossing signal system (i.e., the automatic gates and flashing lights), negligent train operation, and negligent failure to provide adequate warnings. Petitioner also sought punitive damages under Ohio statute R.C. 2315.21, alleging that Conrail had acted with actual malice in causing the accident. The trial court granted respondent's motion for partial summary judgment on the punitive damage claim.

Petitioner proceeded to trial against Conrail on negligence claims only. At trial, the judge ruled that petitioner's decedent, Scott Jones, was negligent as a matter

of law for driving around downed gates. The jury found no negligence on the part of Conrail and judgment was entered on the jury verdict for Conrail. Pursuant to Fed. R. Civ. P. 59, petitioner moved for a new trial, arguing that the trial court should have entered judgment against Conrail based on a new liability theory that petitioner had developed only after the trial. The court denied petitioner's post-trial motion. Petitioner also moved for an order certifying five questions to the Ohio Supreme Court on appeal, and the court denied that motion.[1]

On petitioner's appeal to the Sixth Circuit Court of Appeals, the jury's verdict and the rulings on petitioner's post-trial motions were affirmed. Petitioner's petition for rehearing *en banc* was denied.

For the reasons discussed below, there is no cause for this Court's review of the Sixth Circuit decision. Misstatements of fact and law in the petition underscore the obvious lack of meritorious questions for review.

REASONS FOR DENYING THE WRIT

A. The facts will not support a jury verdict for petitioner.

Petitioner urges the Court to review the Sixth Circuit decision in the hope of gaining another trial. Setting aside for the moment the procedural problems with petitioner's reliance on a strict liability theory that was developed

[1] Petitioner proposed the questions pursuant to Rule XVIII, Ohio Supreme Court Rules of Practice.

only after judgment, the argument fails because the facts of this case would not support a finding of liability even under the new liability theory proposed by petitioner.

Scott Jones drove up to a railroad grade crossing where the roadway was closed to traffic by automatic gates and flashing lights. The car that was stopped immediately behind the gates was occupied by a woman and her five-year-old son. One or more drivers behind that vehicle began sounding their horns to urge that driver to go around the gates. Nagucki TR 325, App. H, p. A28. (It is uncertain whether Jones was among those drivers honking at the stopped car.) At trial, the woman testified that her son told her, "No, Mommy, don't go," and she remained stopped at the gates. Nagucki TR 305, App. H, p. A28.

With the lead car stopped at the gates, Scott Jones pulled out into the lane of oncoming traffic, crossing over the no-passing, solid double yellow lines on the pavement, went around the gates, past the flashing lights, and onto the tracks directly into the path of Conrail's train. The engineer was blowing the horn and the alerting lights on the front of the train were flashing. As noted by the trial court in its ruling on petitioner's post-trial motion, the evidence established that the engineer had been sounding the horn for forty seconds. Gardner TR 661, App. I, p. A30. (The horn operation was recorded on a locomotive black box.) Jones either failed to look and listen for the train or entered the crossing expecting to cross ahead of the train. The evidence established that Jones had an unobstructed view of the train for at least 17 seconds before the accident. Berg TR 453, App. J, p. A32.

A second train that was stopped in the vicinity of the crossing was on the far set of tracks 500 feet to the north of the crossing (to the right of Mr. Jones's westbound car.) Landis TR 186, App. F, p. A22. The train that struck Jones approached from his left on the near set of tracks; the stopped train, therefore, did not affect or obstruct Jones's view of the approaching train. If Jones had looked to his left, he could have seen the train; if he had listened, he could have heard the horn.

The jury found that Conrail was not negligent in the maintenance of its crossing or the operation of its train. The signal system was operating properly, as designed, and Conrail's engineer was operating the train lawfully and in accordance with Conrail's rules.

Petitioner urges the Court to effectively legislate a new requirement that railroads take "alternate measures to provide for the safety of motorists" when a signal system is operating at a 2-track crossing because of standing equipment on one track. (p. 10.) Even if the court were to announce such a rule, a retrial of this case under that ruling would not change the outcome here. Petitioner asserts that Conrail had a train stopped near the crossing for "at least 10 minutes," and that Conrail's crew on the stopped train "took no measures to provide for the safety of highway traffic" (p. 2.) Both statements are simply untrue.

Conrail's INPI-7 train came to a stop on the far set of tracks, about 500 feet from the crossing, in order to remove some helper units (additional locomotive power) that had been added to the rear of the train to assist it in climbing "Wooster Hill." Landis TR 174, App. F, p. A21.

After INPI-7 had crossed Wooster Hill, the helper units were no longer needed, and Conrail was cutting off the units for other use. The crew testified that the uncoupling of the helper units usually takes about 5 minutes, and that the process had not yet been completed when the second train, ENS-401, came into view. Russell TR 151, 715, App. G, p. A25. The evidence was, therefore, that the train was stopped for only a few minutes. During that time, the conductor on INPI-7 was preparing to flag the crossing, and was putting on his winter weather gear (coat and boots) when he saw the approaching train. Russell TR 151, App. G, p. A24.

In short, Conrail's crew was attempting to provide supplemental warnings to motorists at the crossing. The jury's finding that Conrail was not negligent was correct and supported by the evidence even under the duty argued by petitioner here. The Court should not grant the Certiorari petition because the ruling sought by petitioner would not affect the outcome in this case.

B. Petitioner failed to raise this argument before trial.

The argument raised in this petition is that the Court should announce a rule of negligence *per se* and strict liability in the interest of public safety to require that railroads provide alternative warnings when signal systems are activated by trains stopped within the track circuitry at multi-track crossings. Petitioner, however, never made that argument until after judgment was entered at the jury trial. In his post-judgment motion for new trial, petitioner's counsel wrote that this liability

theory "struck him like a lightning bolt several days after the jury's verdict . . . " (Motion, App. D, p. A17.)

The Sixth Circuit noted that appellate courts will "reach newly-advanced arguments only where the proper resolution is beyond any doubt or where 'injustice might otherwise result.' " *Jones v. Consolidated Rail Corporation*, No. 96-3828. App. 5a, *quoting Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The trial court did not restrict petitioner in presenting the legal theories underlying her case, and she had an obligation to identify all of her theories of recovery when the case was tried.

Petitioner does not answer the Sixth Circuit's decision to "decline to address" the arguments that she makes here. Pet. App. 6a. This Court should decline to grant certiorari on a question that was not properly presented to the Sixth Circuit and was not decided by the Sixth Circuit.

C. The legal theory of petitioner's argument is wrong.

Petitioner urges the Court to announce a rule that signal systems at multi-track railroad crossings are "disabled" when those systems are activated by railroad equipment standing within the track circuit. Petitioner proposes that such a rule would improve safety by requiring railroads to provide alternative warnings. (Petitioner had also presented a related argument on appeal below, not raised here, that the proposed new rule would excuse drivers who go around gates under those conditions. The trial court's finding that Mr. Jones was negligent as a matter of law for driving around downed gates, therefore, is no longer in dispute.) Petitioner cites to two

sources as support for her argument: (1) the Federal Railroad Administration's (FRA) regulatory definition of an "active warning device," and (2) this Court's decision in *Baltimore & P.R. v. Catharine Landrigan*, 191 U.S. 461, 24 S. Ct. 137, 48 L.Ed. 262 (1903).

At 23 C.F.R. 646.204(j), the FRA defined an "active" warning device as one "activated by the approach or presence of a train, such as flashing lights, automatic gates and similar devices . . . all of which display to motorists a positive warning of the approach or presence of a train." Pet. App. 174a. Petitioner argues that when a warning system has been activated by railroad equipment standing within the track circuit, it is no longer an "active" warning device because it does not signal a "positive warning of the approach of a train."

The flaw in that argument is that it focuses on only part of the definitional language in the regulation and ignores the rest. A warning system that gives positive warning of the "presence" of a train is an "active" warning system under the regulation, whether or not it provides a positive warning of the approach of a train. The signal system at the Back Orrville Road was an "active" system on the evening of the accident.

Moreover, the FRA addressed the situation of signal systems activated by standing trains and *rejected* the requirement proposed by petitioner here that railroads provide alternative warnings when trains activate those systems in the course of normal operations. At 49 C.F.R. 234.209, the FRA required railroads to "provide for safety of highway traffic" when the "normal functioning of any

system" is "interfered with," and defined such interference to include "trains, locomotives or other railroad equipment standing within the system's approach circuit, *other than normal train movements* or switching operations, where the warning system is not designed to accommodate those activities." (Emphasis added.) The FRA issued a rule-interpretation notice on March 24, 1995, stating that "it shall not be considered interference if a train is standing on an approach circuit waiting for a signal indication or authority for movement." (Rule Interp., App. E, p. A19.) In other words, FRA expressly rejected any requirement that railroads provide alternative warnings when signal systems are activated by trains engaged in normal train movements, such as those in which INPI-7 was engaged.

Congress gave the FRA exclusive authority over matters of railroad safety by declaring that regulations promulgated by the FRA preempt state authority over those subjects.[2] Petitioner's proposal that the Court override the authority of the FRA and impose, through common-law duties, new requirements on railroads that the FRA has expressly rejected is misguided and indicates a mistaken view on the role of the Court.

The Court's 1903 decision in *Baltimore & P.R. v. Landrigan*, 191 U.S. 461, likewise, does not support petitioner's argument. That case involved a manual railroad gate that was left down at night over the roadway without an

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[2] 49 U.S.C. 20106 states: " . . . A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." (App. K, p. A34.)

attendant. The gate required an attendant for operation. Since the gate operation was not automatic, *i.e.*, "activated by the approach or presence of a train," as specified under 23 C.F.R. 646.204(j), it was not an "active warning" system as defined by FRA. In effect, the railroad gate in *Landrigan* was no different from a flagman. The Court's decision in *Landrigan* cannot be applied to affect the scope of a railroad's duty at today's active-warning crossings.

The Sixth Circuit's decision below is consistent with rulings from that court in two prior cases. In *Ayoub v. National Railroad Passenger Corp.*, 76 F.3d 794 (6th Cir. 1996), the plaintiff's decedent, like Scott Jones, drove around traffic that was stopped at an automatic-gate crossing and was struck by a train. Plaintiff alleged that the railroad breached its duty to provide credible warnings because the gate system had a history of malfunctions. The trial court dismissed the case on summary judgment and the Sixth Circuit affirmed, holding that "evidence of prior malfunctions of warning signals at a railroad crossing is irrelevant so long as the signals functioned properly at the time of the accident." *Id.* at 796.

Likewise, in *Cox v. CSX Transp. Inc.*, no. 88-6235, 88 F.2d 1086 (Table), 1989 WL 119375 (6th Cir. 1989), the plaintiff was struck by a train when he drove onto a crossing where flashing light signals were operating. Plaintiff claimed that the signals were unreliable because of prior malfunctions. The trial court excluded evidence of the alleged prior malfunctions and the case went to a jury which returned a verdict for the railroad. The Sixth Circuit affirmed the judgment, holding that evidence of the prior malfunctions was irrelevant. Moreover, the Court ruled that even if the trial court erred in excluding

the evidence, that error would be harmless, given the driver's absolute duty to obey the warnings and use caution, whether or not he believed the warnings to be credible. Noting that the plaintiff could have seen the train when the train was 600 feet or more away, the court held that evidence of the alleged prior malfunctions would not excuse the driver's conduct:

> "Under the circumstances, we hold that the proffered evidence would not have been probative of a justification for Cox's actions."

Unable to locate supporting authority for her argument, petitioner can cite only to decisional law that is consistent with the Sixth Circuit's ruling below, arguing that those decisions were wrongly decided. Petitioner cites *McDowell v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 507 F.2d 5 (8th Cir. 1974), *Frankenthal v. Grand Trunk W. R.R. Co.*, 120 Ill. App. 3d 409, 458 N.E.2d 530 (Ill. App. Ct. 1983), *Hamilton v. Allen*, 852 P.2d 697 (Okla. 1993), all cases where courts refused to impose any duty on railroads to provide alternative warnings at gated crossings under the circumstances at issue here.

CONCLUSION

Petitioner proposes that the Court, "in a stroke" (p. 11), change the law regarding the duty of railroads at active-warning crossings and that such change be made retroactive so that she may retry her case without the burden of proving fault. For the reasons stated herein, the Court should deny this petition.

Respectfully submitted,

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APPENDIX A

James T. COX, Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC, Defendant-Appellee.

No. 88-6235.
United States Court of Appeals, Sixth Circuit.
Oct. 12, 1989.

M.D. Tenn.
AFFIRMED.
On Appeal from the United States District Court for the Middle District of Tennessee.
Before BOYCE F. MARTIN, Jr. and MILBURN, Circuit Judges, and CONTIE, Senior Circuit Judge.
PER CURIAM.

In this diversity tort action, plaintiff-appellant James T. Cox appeals a jury verdict for defendant-appellee *CSX Transportation, Inc.* ("*CSX*"). For the reasons that follow, we affirm.

I.

A.

On May 6, 1980, at approximately 11:40 a.m., James T. Cox was severely injured when the fully loaded dump truck he was driving was struck by an L & N Railroad train at the "Amos" crossing, a private railroad crossing in Williamson County, Tennessee. Cox originally brought an action on May 15, 1981, against the L & N Railroad, Monsanto Company, and the train engineer in the Circuit Court of Williamson County, Tennessee. The original action was voluntarily dismissed on November 11, 1986.

Cox, by and through his guardian, First Tennessee Bank, filed this action on May 14, 1987, against Monsanto Company and CSX (a successor in interest to L & N Railroad). Upon motion of Cox's counsel, an order dated August 17, 1988, was entered dismissing Monsanto Company with prejudice.

Immediately prior to trial, the district court heard motions in limine on evidentiary issues. Plaintiff Cox moved for permission to introduce evidence that he, as a matter of habit, always stopped prior to negotiating the crossing. Defendant moved to exclude all evidence that on previous occasions the signals at the railroad crossing "malfunctioned" in that the signals had activated with no train approaching or had failed to activate when a train approached. Defendant also sought to exclude evidence of "near-misses" between automobiles and trains at the same crossing.

Before ruling on defendant's motion, the district court inquired as to whether it was Cox's position that on the occasion of the accident he stopped at the crossing and whether Cox would present proof that the warning signal was malfunctioning at the time of the accident. Counsel for Cox stated that he would introduce evidence that Cox had a habit of always stopping at the crossing to prove that he stopped on the occasion of the accident, but he conceded that the evidence would show that "the signals were probably functioning." The district court ruled that Cox's counsel could introduce habit evidence to attempt to prove that Cox stopped on the occasion of the accident but that he could not refer to prior malfunctions or "near-misses" in his opening statement. The court's position was that unless Cox intended to prove

that the signal lights were not working on a particular occasion, past negligence would have no "connection" with the accident. Moreover, malfunctions would be irrelevant in light of Cox's position that he stopped.

During his case-in-chief when plaintiff attempted to present the testimony of numerous truck drivers that the warning signals often malfunctioned, the district court would not allow that testimony. At the conclusion of Cox's evidence, CSX moved for a directed verdict on all issues and all theories of liability. The district court granted a directed verdict on the following theories of liability: (1) that defendant was guilty of negligent design and maintenance of the railroad crossing; (2) that defendant was negligent by ignoring warnings of a dangerous condition; and (3) that defendant was guilty of gross negligence and willful misconduct.

After CSX presented evidence that Cox did not stop before entering the crossing, Cox's counsel again tried to offer in rebuttal evidence of prior signal malfunctions and "near-misses."[1] The district court again refused to allow the testimony.

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[1] Cox's proffer included the deposition of Leslie Morell, a local resident, to the effect that she had seen the signals malfunction many times, that she had informed CSX personnel of the malfunctions, and that she had had some "near-misses" when the signal had failed to flash as a train approached the intersection; testimony of several truck drivers that the signals often malfunctioned; testimony of Charles Armstrong, the signal maintenance man, to the effect that he had found the signals malfunctioning during his routine maintenance; and the testimony of Dr. Joseph Able concerning the psychological effects of the signal malfunctions upon motorists. Since Cox has failed to argue the admissibility of the testimony of Dr. Able on

The jury returned a verdict for the defendant. Cox filed a timely motion for a new trial which was overruled. This timely appeal followed.

B.

At the Amos crossing, the L & N Railroad runs generally from north to south, and the haul road on which Cox was traveling runs from east to west. When the collision occurred, the ninety-three-car train was traveling toward the south, and the plaintiff's loaded truck was traveling toward the west across the track.

Prior to the accident, Cox negotiated the crossing several times a day in connection with his job of hauling phosphate from a local mine to a tipple located adjacent to the L & N Railroad track. The train involved in this accident was an "extra," running at a time when trains were not normally expected at the crossing. The parties agree that the weather conditions were dry and clear on the day of the accident. It is uncontested that the train gave a warning whistle and that its rotating headlight was operating as the train approached the crossing.

It is uncontradicted that from the vantage point of a truck driver, such as Cox, a train could be seen at least six hundred feet away. In fact, Cox's counsel conceded on the record that "Jimmy Cox could have seen down the track from better than 600 feet if he were one to two truck lengths back; that may save a lot of time." Tr. 195.

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appeal, we will not discuss it further.

Since Cox was so severely injured that the trial court found him incompetent to testify, the only eyewitnesses able to testify were members of the train crew. The train conductor, Mr. Rauschenberger, testified that the truck approached the crossing, slowed, and when the train was only 150 feet away, Cox's truck proceeded onto the tracks. The conductor engaged the emergency brake, but the momentum of the train carried it into the truck. The conductor testified that he could see Cox and that "[Cox] was looking strait ahead" in his truck.

Cox's position, through counsel, was that he stopped at the crossing as was his habit, that he looked but the train was not visible, and that the train approached at such a high rate of speed that it caught him in the crossing. Several of Cox's codrivers testified that Cox was a very careful driver and that he always stopped at the crossing. Testimony conflicted about the exact speed of the train with the train crew estimated the speed at approximately thirty miles an hour, an expert witness for CSX estimating the speed at thirty-two miles per hour, and Cox's coworkers estimating the speed at forty-five miles per hour.

Plaintiff Cox presents several issues for appeal, all of which turn upon the propriety of the district court's ruling on the admissibility of evidence of prior malfunctions of the warning signals and "near-misses" at the railroad crossing. Plaintiff argues that the evidence was relevant and admissible on the following issues: (1) negligence in the maintenance of the crossing and its signal system, (2) knowledge of the dangerous nature of the crossing created by the malfunctioning signal system, (3) gross negligence and willful and wanton conduct bearing

upon the issues of punitive damages and Cox's contributory negligence, and (4) Cox's contributory negligence.

II.

A.

A trial judge's decision regarding an evidentiary ruling will not be reversed absent a clear showing of abuse of discretion. *See, e.g., Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir.1988); *United States v. Rios*, 842 F.2d 868, 872 (6th Cir.1988) (per curiam), *cert. denied*, 109 S.Ct. 840 (1989) (*citing United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir.1986)). Abuse of discretion exists where the reviewing court is firmly convinced that a mistake has been made. Schrand, 851 F.2d at 157 (*citing Hill v. Bach, Halsey, Stewart, Shields, Inc.*, 790 F.2d 817, 826 (10th Cir.1986)).

A reviewing court will not grant a new trial or set aside a judgment unless the error complained of affects the substantial rights of the parties and some action is necessary to achieve substantial justice. Fed.R.Civ.P. 61; 28 U.S.C. Sec. 2111; *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845 (1984). The reviewer must assess the likelihood that the error affected the outcome of the case. *Schrand*, 851 F.2d at 157.

B.

The district court excluded the proffered evidence because it was "not connected" to this accident and not

relevant. Relevant evidence is evidence having any "tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed.R.Evid. 401. The relevance of evidence depends upon the purpose for which it is offered. *See Koloda v. General Motors Parts Div.*, 716 F.2d 373, 375 (6th Cir.1983). Cox's arguments assert four purposes for the proffered evidence.

First, Cox argues that the evidence is probative of negligent maintenance of the crossing. In Tennessee, a plaintiff can recover on a negligence theory "only if the defendant's conduct can be shown to be (1) negligence, and (2) [a] proximate cause of the injury." *Tennessee Trailways, Inc. v. Ervin*, 222 Tenn. 523, 438 S.W.2d 733, 735 (1969). In proximate cause analysis, the first inquiry is whether the acts of the defendant were a cause in fact of the injury. "If that inquiry shows that defendant's conduct . . . was not a factor in causing plaintiff's damage, that ends the matter." *Id.*

At the trial, it was uncontradicted that the warning signal was functioning as Cox approached the railroad crossing. Moreover, Cox's position throughout the trial was that he stopped out of habit before entering the crossing regardless of whether the signals were on or off. The only logical conclusion is that negligent maintenance was not a factor in causing Cox's injury. We agree with the trial court that past malfunctions and "near-misses," if offered to prove negligent maintenance, were "not connected" and irrelevant.

Cox's second argument for admissibility of the evidence is that past malfunctions and "near-misses" gave notice to CSX of a "dangerous condition." This argument presupposes that prior malfunctions made the crossing dangerous on the day of the accident. The train engineer testified that if he were aware of a problem with the signals, he would change the way he operated his train. However, the uncontradicted proof at trial was that the signals were working on the day of the accident. In the absence of proof that a dangerous condition existed at the time of the accident, we must conclude that notice that a dangerous condition had existed would be irrelevant.

Moreover, before this court will allow proof of similar incidents to show notice of a dangerous condition, the circumstances involved must be sufficiently similar to give notice of the danger. *Koloda*, 716 F.2d at 376. The proffered testimony of Mrs. Morrell was about "near-misses" which occurred when a train was on the tracks but the warning signals failed to activate. Truck drivers would have testified that the signals often malfunctioned, sometimes giving false warnings and sometimes failing to give a warning when needed. The proffered testimony of Mr. Armstrong, the man who maintained the signals for CSX, was to the effect that he found the signals flashing in the absence of a train on one or two occasions in the course of routine maintenance. While the proffered testimony might prove that defendant CSX knew the signals had malfunctioned, it does not prove that CSX had notice of the alleged danger; viz., that drivers were ignoring an active warning signal at the railroad crossing.

Cox next argues that the proffered evidence should have been admitted to prove that the defendant was

guilty of gross negligence and willful misconduct. In light of our conclusions that past negligent maintenance was irrelevant to this action and the past incidents were not probative of notice to defendant CSX that drivers were ignoring active warning signals, we find that this argument is without merit.

Finally, Cox argues that the evidence was admissible on the issue of his own contributory negligence. Simply stated, Cox's argument is that past malfunctions caused him to ignore or pay less attention to the signal on the day of the accident. We note that this argument flies directly in the face of Cox's position, and proof, that he always stopped as he approached the crossing and would require a jury to speculate that he suddenly decided the signals were too unreliable to follow.

Cox argues that prior malfunctions justifiably "blunted the edge of caution," relying on the "absent flagman" cases. *See, e.g., Gaines v. Tennessee Central Ry. Co.*, 175 Tenn. 389, 135 S.W.2d 441 (1940); *Southern Ry. Co. v. Penley*, 175 Tenn. 380, 134 S.W.2d 177 (1939). The "absent flagman" cases hold that "where the railroad company maintains a watchman, that fact being known to the traveler, and the watchman is away from his post of duty and fails to signal the approach of trains" and an accident results, the jury should be allowed to decide whether the traveler was justified to rely on the absence of a flagman. *Penley*, 175 Tenn. at ___, 134 S.W.2d at 180.

We do not find those cases persuasive. In the "absent flagman" cases, travelers were mistakenly relying on past reliability. Cox argues that he was refusing to rely on the

signals at the railroad crossing because of past unreliability.

In *Nashville, Cinn. & St. Louis Ry. v. Barnes*, 177 Tenn. 690, 152 S.W.2d 1023 (1941), the Tennessee Supreme Court held that a motorist was guilty of contributory negligence as a matter of law because he failed to roll his windows down or take extra precautions to hear a train approaching a railroad crossing in view of increased danger from very limited visibility. "[W]hen a crossing is 'particularly dangerous' because of conditions obvious to the driver, he should stop in order effectively to look and listen before proceeding on the tracks, this in the exercise of ordinary care." *Id.* at ___, 152 S.W.2d at 1025. Under the facts of this case, the danger was obvious to Cox. As he traversed this same railroad crossing several times a day, his duty of care for his own safety was increased rather than decreased.

Moreover, motorists must not enter a railroad crossing unless it is safe to do so. "In Tennessee, a railroad crossing is a warning of danger and a motorist is required to exercise ordinary care for his own safety." *Newport v. Cincinnati, New Orleans & Texas Pac. Ry.*, 509 F.2d 1246, 1248 (6th Cir.1975) (applying Tennessee law). A motorist entering a railroad crossing must look and listen and is "chargeable with seeing what [is] there for him to see." *Jeffries v. Louisville & Nashville RR*, 560 S.W.2d 920, 921 (Tenn.Ct.App.1977), *cert. denied* (1978).

There for him to see and to hear was a train approaching with lights flashing, whistle blowing and bell ringing. Perhaps the visibility was to some degree

limited by tree growth, but plaintiff knew of that condition as he crossed that same track . . . each working day. The evidence is undisputed that the rain could have been seen by plaintiff for some distance before mounting the tracks. *Id.* at 922 (affirming a directed verdict on those facts).

In this case, the evidence is undisputed that Cox knew of the crossing and could have seen the train when it was 600 feet or more away. Crossing warning lights were operating. The train sounded a warning whistle, and its Mars light was operating. It was daylight on a clear, dry day, and according to undisputed eyewitness testimony, Cox pulled in front of the train when it was only 150 feet away without looking toward the train. Under the circumstances, we hold that the proffered evidence would not have been probative of a justification for Cox's actions. Accordingly, we conclude that the district court did not abuse its discretion by refusing to admit the proffered evidence on the issue of Cox's contributory negligence.

Assuming arguendo that the district court committed error, we would find the error harmless. The uncontradicted evidence is that Cox could have seen the train when it was 600 feet or more away and that he could have stopped his truck before he reached the rails. Under Tennessee law he is guilty of contributory negligence as a matter of law. *See Newport*, 509 F.2d at 1249 (applying Tennessee law to reverse a trial court by finding contributory negligence as a matter of law on very similar facts); *Perry v. Gulf, Mobile & Ohio RR*, 502 F.2d 1144, 1146 (6th Cir.1974) (applying Tennessee law and finding contributory negligence as a matter of law where driver was

aware of the crossing and at 25 feet from crossing driver could see 500 feet up the tracks); *Jeffreys* [sic], 560 S.W.2d at 922.

Cox claims additional errors as follows: (1) the trial court erred in granting a directed verdict on the issue of negligent maintenance; (2) the trail court erred in granting a directed verdict on the issue of gross negligence; and (3) the trial court erred in not granting a new trial. All of these arguments are premised upon the claim that the district court erred in excluding the proffered evidence concerning prior malfunctions and related matters. Since we find no error in the evidentiary rulings, we find no merit in these assignments of error.

III.

Accordingly, for the reasons stated, we AFFIRM.

APPENDIX B

TITLE 23 – HIGHWAYS

CHAPTER I – FEDERAL HIGHWAY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 646 – RAILROADS – Table of Contents

Subpart B – Railroad-Highway Projects

Sec. 646.204 Definitions.

For the purposes of this subpart, the following definitions apply:

Active warning devices means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train.

Company shall mean any railroad or utility company including any wholly owned or controlled subsidiary thereof.

Construction shall mean the actual physical construction to improve or eliminate a railroad-highway grade crossing or accomplish other railroad involved work.

A diagnostic team means a group of knowledgeable representatives of the parties of interest in a railroad-highway crossing or a group of crossings.

Main line railroad track means a track of a principal line of a railroad, including extensions through yards,

upon which trains are operated by timetable or train order or both, or the use of which is governed by block signals or by centralized traffic control.

Passive warning devices means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

Preliminary engineering shall mean the work necessary to produce construction plans, specifications, and estimates to the degree of completeness required for undertaking construction thereunder, including locating, surveying, designing, and related work.

Railroad shall mean all rail carriers, publicly-owned, private, and common carriers, including line haul freight and passenger railroads, switching and terminal railroads and passenger carrying railroads such as rapid transit, commuter and street railroads.

Utility shall mean the lines and facilities for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, water, steam, sewer and similar commodities.

[40 FR 16059, Apr. 9, 1975, as amended at 62 FR 45328, Aug. 27, 1997]

APPENDIX C

TITLE 49 - TRANSPORTATION

CHAPTER II - FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 234 - GRADE CROSSING SIGNAL SYSTEM SAFETY - Table of Contents

Subpart D - Maintenance, Inspection, and Testing

Sec. 234.**209** Interference with normal functioning of system.

(a) The normal functioning of any system shall not be interfered with in testing or otherwise without first taking measures to provide for safety of highway traffic that depends on normal functioning of such system.

(b) Interference includes, but is not limited to:

(1) Trains, locomotives or other railroad equipment standing within the system's approach circuit, other than normal train movements or switching operations, where the warning system is not designed to accommodate those activities.

(2) Not providing alternative methods of maintaining safety for the highway user while testing or performing work on the warning systems or on track and other railroad systems or structures which may affect the integrity of the warning system.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REBECCA A. JONES, Executrix of the Estate of Scott R. Jones, Deceased Plaintiff, -vs- CONSOLIDATED RAIL CORPORATION Defendant.	CASE NO. 5:94CV2021 Judge Dowd **MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL**

Introduction

This case presented the jury with sharply conflicting theories. Jones argued that the warning system at the Back Orrville crossing was "malfunctioning" and that Conrail negligently failed to take readily available preventative measures to warn Scott Jones that a train was approaching. Conrail contended that Jones was given adequate warning of an approaching train; that Jones broke the law by driving around functioning gates; and that his action was the sole proximate cause of his death. What both parties unwittingly overlooked, however, is the fact that the gates and lights at this crossing were neither functioning nor malfunctioning **as active warning devices** when this collision occurred. They simply weren't functioning at all because, approximately 15 minutes before Scott Jones arrived, they had been **deactivated as an active warning system by INPI.**

Consequently, the warning system was inadequate, as a matter of law, to warn Jones that a train was approaching.

Rule 59(9)(A) provides for a new trial when an error of law occurs at trial and is brought to the attention of the trial court through a timely post-trial motion. This case was tried to the jury **as if there were a factual dispute about whether the gates and lights were functioning as an active warning system when they clearly were not.** As this discussion will show, Conrail violated a safety statute and, therefore, was negligent as a matter of law. Had plaintiff's counsel pointed this out to the Court when he moved for a directed verdict on the issue of Conrail's negligence, the Court would have been obliged to direct a verdict in plaintiff's favor on that issue. Because this was not done, the Court overruled plaintiff's motion for a directed verdict. As a result, the jury returned a verdict which cannot be reconciled with the fact that Conrail breached its duty to maintain the gates and lights as an active warning system while ENS401 was approaching. Consequently, Jones is entitled to a new trial.

This case reveals once again the truth of Edward R. Murrow's favorite aphorism: "the obscure we see, the obvious takes longer." Although this writer feels a sense of chagrin at having missed the obvious until the truth struck him like a lightning bolt several days after the jury's verdict, he has plenty of distinguished company in failing to recognize the fact that, when gates and lights have been activated for an extended period of time, **they cease to function as an active warning device.** The tragedy is that, although thousands of deaths and crippling injuries have occurred in circumstances where gates and

lights have been activated for an extended period of time, this fundamental truth has been missed by legislatures, regulatory agencies, courts and lawyers alike. The *Wightman* case is apparently one of a small handful of cases which have been successfully prosecuted on behalf of a person killed or injured after proceeding around gates. It seems apparent, therefore, that Scott Jones' death should be viewed as the tip of an iceberg which represents nothing less than a public safety issue of profound proportions. This being the case, this writer feels morally compelled to do more than simply ask this Court to grant plaintiff a new trial. The overriding aim of this memorandum, therefore, will be to convince this Court that the best way to reduce unnecessary deaths and catastrophic injuries at grade crossings is for this Court to assist in getting the issues raised herein before the United States Supreme Court in the most expeditious manner possible.

After carefully analyzing the factual and legal basis for Plaintiff's Motion for a New Trial, this memorandum will attempt to show that automatic warning devices at public grade crossings should be treated as safety appliances, in the same way handholds and brakes are considered legislatively mandated safety devices for the protection of employees under the Federal Employers' Liability Act. When an employee is injured because of a defect in a safety appliance, a railroad company is held strictly liable. Permitting safety equipment at a grade crossing to remain deactivated while a train is

* * *

APPENDIX E

FRA Rule Interpretation

Interference is any condition that circumvents, hinders, impedes, or diminishes whatsoever the intended warning of a system, and may be accomplished by testing, installing, repairing, replacing, operating, or manipulating a warning system component used in detecting the presence of or displaying warning of a train, or in indicating the operation of the warning system. There is no difference between the accidental or intentional interference with respect to the enforcement of this rule.

Tests of crossing warning system must not be conducted until it has been ascertained no train movements will be affected and provisions have been made for the safety of highway traffic.

Interference includes but is not limited to:

(1) Trains, locomotives, or other railroad equipment left standing within the system's approach circuit, other than normal switching operations, where the warning system is not designed to accommodate those activities.

(2) Not providing alternative methods of maintaining safety for the highway user while testing or performing work on the warning systems or on track and other railroad systems or structures which may affect the integrity of the warning system.

(3) Tieing up gate arms by railroad personnel.

It shall not be considered interference if a train is standing on an approach circuit waiting for a signal indication or authority for movement. It shall not be considered interference, when in the course of normal testing, a

shunt placed on the rail causes adjacent crossing warning systems to be activated.

Using manual over-rides to activate or deactivate a crossing warning system is not considered interference, as long as proper warning is provided to highway users.

Activation of a warning system during a normal movement through a crossing by on-track vehicles is not considered interference with the warning system. Intermittant activations during a normal movement through a crossing by on-track vehicles is not considered interference with the warning system, provided that the railroad's operating rules or other instructions provide for warning of highway traffic at the crossing. In general, measures taken for the safety of trains and highway users should be consistent with those specified in Sections 234.105 and 234.107 of this part.

March 24, 1995

APPENDIX F

[Excerpts From The Testimony Of John Landis]

* * *

[p. 174] Q. And you got your consist and you left according to the records about 3:50 p.m.?

A. Right.

Q. You would have pulled out of Crestline?

A. Left Crestline.

Q. I'm sorry, sir?

A. Left Crestline.

Q. Left Crestline. And we already know from Mr. Russell that sometime along the route or about the time you left Crestline, doesn't matter exactly, you became aware you would need some help getting over the Wooster hill?

A. We knew before we left Crestline.

Q. Okay. So Mr. Russell has a little different recollection. Doesn't matter. It's your recollection.

You knew you were going to get a helper before you left?

A. We had – I was short a unit because it was down and I had to have so many horses to go over the hill. I was short horses.

Q. So you needed extra horsepower to push the train over the hill?

A. That's right.

Q. And Mr. Russell has already told us your consist was 130 cars?

A. As I recollect in that neighborhood.

* * *

[p. 186] lights, do you recall approximately how fast you would have been going?

A. Really do not know because I was in the process of stopping my train.

Q. Okay. Now, can you give us just your best recollection? Would you think you were going more than ten miles an hour at the time you came to the point where you tripped the gates, or less than ten miles an hour?

A. I'd say greater, because I hadn't cleared the hot box detector yet.

Q. Okay. Would it be greater than 15 miles an hour?

A. No.

Q. Okay. So between 10 and 15, am I correct?

A. That's correct.

Q. And from that point on, as I get the picture, you are gradually coming to a stop?

A. Right.

Q. All right. Okay. Now, do you happen to recall approximately where you came to a stop that evening, February 7th, 1994?

A. There was a sizable tree on the left-hand side of the rail. I was well west of that or behind it.

Q. And if I recalled correctly, you and Mr. Russell and I think Mr. North from ENS about a year after this happened, went out together and kind of compared notes as

* * *

APPENDIX G

[Excerpts From The Testimony Of J.D. Russell]

* * *

[p. 715] A. Yes.

Q. You can do it safely and easily?

A. Yes.

Q. And then what you do after you get off the engine, if your intent is to go up and protect the crossing, there's plenty of space on the railroad right-of-way, the jury was out there and saw the right-of-way, so you can walk from wherever you're starting, you can walk completely free of the tracks and in complete safety and walk down to the crossing?

A. Yes.

Q. In this case if you were 500 feet away or 300 feet away or what have you, you certainly had time to walk to the crossing before ENS 401 arrived?

A. No, I didn't even have my coat or boots on.

Q. I understand that. You say you were doing things after the train came to a stop before you left?

A. I was getting – when he came to the stop I was getting my coat and boots to go on up there to protect the crossing.

Q. You remember you were not doing your paperwork then?

A. No.

Q. You were putting on your boots, the five buckle artics [sic], and getting your heavy gear on?

A. Yes.

Q. I think in a deposition you said you may have been

* * *

[p. 151] THE COURT: And do they then tell you when they have accomplished the disconnect?

THE WITNESS: Yeah, they acknowledge it.

THE COURT: And you say that takes about five minutes?

THE WITNESS: Yeah, about all it takes.

THE COURT: So you will be there for five minutes no matter what while the disconnect takes place?

THE WITNESS: Yeah.

THE COURT: All right. Thank you.

MR. MURRAY: And I want to thank you, your Honor, because I will confess I didn't understand that.

BY MR. MURRAY:

Q. During that five minutes or so, what do you do as the conductor?

A. Well, that day I was getting my clothes on, I was going to walk up to the crossing.

Q. Okay. I understand, but I think my question is in relation to this function of getting the helper train

released, do you have a job that you have to do at the front end?

A. Well, like if we don't have no crossing to block, no, generally don't, no.

Q. So my question is this: You stop at 5:50, let's assume hypothetically, and I wanted you to know I told this

* * *

APPENDIX H

[Excerpts From The Testimony Of Jeanne Nagucki]

* * *

[p. 305] cars from over there on the side there. Just show us what you remember those cars doing.

A. They would come up the road, and they would just – it would be a short pause.

Q. Ah-hah.

A. And then they would go on through.

Q. All right.

A. And that was approximately five to seven coming from the Wooster area.

Q. All right.

A. Towards Orville.

Q. All right. Now, ma'am, while I have you there, what do you remember – did that – did that happen consecutively? Did those five to seven cars all come by you in a sort of a line of traffic?

A. Yes.

Q. All right. And what do you remember next?

A. Okay. After that, then cars on my side – well, first off I said to my boy at that point, "Do you think that we should go," and because I thought we were just sitting there because of the stopped train and I wasn't sure how long we would be sitting there.

He told me, "No mommy, don't go. What if that train starts moving." So that kind of stuck in my mind.

So I sat there awhile longer and then approximately

* * *

[p. 325] was no other traffic in front of you in the same lane but there was traffic opposing you and it began driving around the downed gates; is that correct?

A. Yes.

Q. And those gates had been down ever since you had crested the hill; is that correct?

A. Yes.

Q. Did you see the flashing lights at any time at the crossing?

A. I can't recall that.

Q. Okay. If people testified the flashing lights were on, would you dispute that?

A. I'd say I'm not sure. I – I can't say one way or another.

Q. Okay. And then it became apparent to you, did it not, that other drivers behind you in the same direction of travel were pushing to get across this crossing; is that correct?

A. Yes.

Q. And that you became concerned that these other – about this other traffic; is that correct?

A. Yes, it did put me under pressure a little bit.

Q. Okay. And then you even felt enough pressure that you talked to your son and said to your son, "Do you think this is safe"; is that correct?

* * *

APPENDIX I

[Excerpts From The Testimony Of Tom Gardner]

* * *

[p. 661] horn and what I'm looking for is any time you see a zero it means the horn is not on and a one means that it's being blown.

There's a magnet valve that's basically being picked up. As you go down through here, what I'm looking for is also a number of things. The particular accident we're looking at here, I look at the auto pressure to see what that's showing. I look at current with the throttle position, I'm looking over where it says PKD. That's power knock down and EIE is engineer initiated emergency. It says he put that in emergency.

At that point you look over in the horn channel and it's showing a one at that time. Then you look back and it shows a series of ones that goes back in a time interval from that location.

Q. How long is that time interval?

A. It's going from 1901, 16 seconds to 1901, 56 seconds which is 40 seconds.

Q. Now you've mentioned something, EIE, did I get that right?

A. Right. That's engineer initiated emergency. That's a separate channel in the recorder.

Q. That's about the third or fourth line down on the strip sheet from the bottom?

A. That's correct.

* * *

APPENDIX J

[Excerpts From The Testimony Of William Berg]

* * *

[p. 453] believe would be reasonable to expect.

Q. I don't think it's a tough question. I'm asking you whether or not in every time that you analyzed cars going around downed gates, you use ten miles an hour as the speed for the cars?

A. I don't know that I can answer that. I'm trying to think of other situations that – where I have done this type of analysis under similar circumstances.

And I'm not sure that I can bring anything to mind where I can answer the question that I did this same or something that was different.

Q. All right. You testified, I believe, that Engineer North would have seen the crossing at 1440 feet; is that correct?

A. Somewhere around 14, 1500 feet would be the first practical opportunity to have seen the crossing.

Q. And at 1500 feet, at a track speed of 60 miles an hour, how many seconds would it take Mr. North to reach the crossing?

A. At 1500 feet?

Q. Yes.

A. About 17 seconds.

Q. And I want to talk to you, ask some questions now about the values reflected in feet of what we saw on

the screen. We saw two pictures; we saw one picture of kind of

* * *

APPENDIX K

49 USC Sec. 20106

TITLE 49 – TRANSPORTATION

SUBTITLE V – RAIL PROGRAMS

PART A – SAFETY

CHAPTER 201 – GENERAL

SUBCHAPTER I – GENERAL

Sec. 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.